

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|   |   |                      |
|---|---|----------------------|
| In the Matter of                              | ) |                      |
|   | ) |                      |
| 2014 Quadrennial Regulatory Review - Review   | ) | MB Docket No. 14-50  |
| of the Commission's Broadcast Ownership       | ) |                      |
| Rules and Other Rules Pursuant to Section 202 | ) |                      |
| of the Telecommunications Act of 1996         | ) |                      |
|   | ) |                      |
| 2010 Quadrennial Regulatory Review - Review   | ) | MB Docket No. 09-182 |
| of the Commission's Broadcast Ownership       | ) |                      |
| Rules and Other Rules Pursuant to Section 202 | ) |                      |
| of the Telecommunications Act of 1996         | ) |                      |
|   | ) |                      |
| Promoting Diversification of Ownership        | ) | MB Docket No. 07-294 |
| In the Broadcasting Services                  | ) |                      |
|   | ) |                      |
| Rules and Policies Concerning Attribution of  | ) | MB Docket No. 04-256 |
| Joint Sales Agreements in Local Television    | ) |                      |
| Markets                                       | ) |                      |

**NEXSTAR BROADCASTING INC.  
REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

Nexstar Broadcasting, Inc. ("Nexstar") hereby replies to the Oppositions to the Petitions for Reconsideration submitted by the American Cable Association ("ACA") and the Office of Communication, Inc. of the United Church of Christ, et al. ("UCC" and collectively with ACA, "Opposers")<sup>1</sup> with respect to the Order in the above-referenced proceedings.<sup>2</sup>

**I. PROCEDURAL DISMISSAL OF THE PETITIONS IS INAPPROPRIATE.**

Opposers seek procedural dismissal of the Petitions, claiming that Petitioners' arguments were "fully considered and rejected by the Commission" and Petitioners have not identified "any

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<sup>1</sup> See ACA, Opposition to Reconsideration (Jan. 24, 2017) ("ACA Opp."); UCC, Opposition to Reconsideration (Jan. 24, 2017) ("UCC Opp.").

<sup>2</sup> 2014 *Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd. 9864 (2016) ("Order").

material error, omission or reason warranting reconsideration.”<sup>3</sup> This is apparently the *de rigueur* argument to be made when parties cannot substantively address a Petition’s arguments and are limited to merely parroting back the Commission’s own flawed reasoning. But where there is even a colorable argument that the Commission failed to make a reasoned decision and instead committed a material error (let alone when there is a clear demonstration of analytical failure as reflected in the Petitions), the exercise of discretion to dismiss such petition for reconsideration at the staff level is inappropriate and not in the public interest.<sup>4</sup>

Indeed, the entire purpose of reconsideration is to provide the agency with a vehicle to remedy its prior missteps, including by correcting “material error[s],” such as the failure—as here—to engage in “reasoned decision-making.”<sup>5</sup> Nonetheless, Opposers seem to believe that talismanic recitation of variations on the theme that the Commission “considered and rejected” the Petitioners’ arguments somehow precludes Commission reconsideration when Petitioners have identified material errors. Such an interpretation would moot the core of Section 1.429, and is all the more improper in the context of a Quadrennial Review proceeding, the purpose of which is to timely ensure the Commission’s regulations are in line with competitive changes in the marketplace.<sup>6</sup>

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<sup>3</sup> 47 C.F.R. § 1.429(l); *see, e.g.*, ACA Opp. at 3, 8-9, 10, 12, 14, 24; UCC Opp. at 4.

<sup>4</sup> *Amendment of Certain of the Commissions Part 1 Rules of Practice & Procedure & Part 0 Rules of Commission Organization*, Report and Order, 26 FCC. Rcd. 1594, 1606 (2011).

<sup>5</sup> *See* 47 C.F.R. § 1.429(l)(1); 5 U.S.C. § 706(2)(A); *CBS Corp. v. FCC*, 663 F.3d 122, 151 (3d Cir. 2011) (agency actions are “arbitrary and capricious” where there is no “reasoned explanation”).

<sup>6</sup> *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (“[T]he very purpose of § 202(h) is to function as an ‘ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace’ . . . reinforces the need for timeliness.”) (citation omitted).

## II. THE OPPOSERS' DEFENSES OF THE ORDER ARE AS FLAWED AS THE ORDER ITSELF.

Opposers provide nothing remotely resembling a credible defense of the Order's decisions to retain the local television ownership rule and to attribute joint sales agreements ("JSAs"). As an initial matter, Opposers disregard the plethora of record evidence reflecting the extensive changes in media consumption and purchasing over the past 20 years. For its part, UCC wholly ignores the Commission's cavalier dismissal of the growing video alternatives to broadcast television as not "meaningful."<sup>7</sup> ACA, on the other hand, parrots the Commission's assertion that it is competition only with other television stations that "motivates a broadcast station to invest in better programming and to provide tailored needs and interest of the local community in order to gain market share," claiming that the Commission provided a careful examination of the relevance and weight of the record evidence.<sup>8</sup> However, as Nexstar so aptly demonstrated in its Petition, the Order's conclusion that news and other programming delivered today by MVPDs, the Internet and mobile platforms were of limited relevance is at odds with the extensive record evidence of new media platforms' increasing influence on news flow at a local and national level.<sup>9</sup> This is more than a "disagreement[]" with the "relevance of and weight" of the evidence, as ACA claims. It is a material error and omission that demands reconsideration.

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<sup>7</sup> *Order*, 31 FCC Rcd. at 9873. Indeed, instead of addressing Nexstar's showing on its merits, UCC spends the entirety of its section on the local television rule defending the Order's procedural rejection of the Caves & Singer economic study submitted by NAB in July 2016. *See* UCC Opp. at 5-6. Chairman Pai's dissent admirably articulates the manifold reasons why rejection of that study was erroneous, *Order*, Dissenting Stmt. of Comm'r Ajit Pai, 31 FCC Rcd. at 10052-53 n.47 ("*Pai Dissent*"), and Nexstar will not restate them here.

<sup>8</sup> ACA Opp. at 3, 9-11.

<sup>9</sup> Nexstar Petition at 6-7.

With respect to the Order's retention of the "top four" prong of the local television ownership rule, Nexstar cited the absence of record evidence to support the Commission's "belief" that an owner of two television stations in a DMA would have a diminished incentive to invest in improved programming, while pointing to abundant record evidence that common station ownership leads to an *increase* in local news and high-quality programming.<sup>10</sup> The Order arbitrarily minimized this evidence as mere "anecdotes," choosing instead to rely on purely theoretical concerns of its own making with no foundational evidence. Nexstar also demonstrated that the Commission's retention of the "eight-voices" standard was bereft of any evidence that some particular number of stations in a DMA will perforce cause television broadcasters to improve their local news and public interest programming, or that television stations in the more than one hundred "less than eight" DMAs compete less fiercely than stations in larger markets.<sup>11</sup>

UCC does not bother to address these issues at all, while ACA invokes its mantra that Nexstar's arguments were "fully considered and rejected," and that Nexstar failed to show that "any purported errors or omissions are material."<sup>12</sup> ACA supports its incantation with a nearly wholesale summation of what Chairman Pai characterized as "two paragraphs of unsupported assertions" and likened to Peggy Lee's "Is That All There Is?"<sup>13</sup> One can hardly imagine error and omission that is more material than ignoring actual evidence in favor of speculative theory.

Opposers are similarly unconvincing in their defenses of the Order's re-imposition of the JSA attribution rule. Nexstar established that this action was arbitrary and capricious in

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<sup>10</sup> Nexstar Petition at 9 & n.23.

<sup>11</sup> *Id.* at 11.

<sup>12</sup> ACA Opp. at 13-17.

<sup>13</sup> *Pai Dissent*, 31 FCC Rcd. at 10054-55.

numerous respects: (1) it ignored the manifold public interest benefits produced by JSAs; (2) no factual basis exists for the Commission’s assertion that JSAs confer an attributable level of “control” on the advertising selling party; (3) in attributing television JSAs, the Commission incorrectly relied on its previous attribution of radio JSAs; and (4) the re-imposition of the rule was entirely inconsistent with Commission precedent in other contexts.<sup>14</sup>

Once more, ACA counters with a dutiful rehashing of what passes for the Commission’s rationalization for re-adopting the JSA attribution rule; and where necessary, given the Order’s entirely summary treatment of the matter, a return to the equally unsustainable rationale of the 2014 Order originally adopting the rule.<sup>15</sup> And once more, ACA’s rote incantation of “no material error or omission”<sup>16</sup> rings hollow. There is a literal mountain of record evidence in these quadrennial review proceedings (as well as the JSA proceeding) demonstrating the public interest benefits of JSAs.<sup>17</sup> In the Order, and the 2014 Order that preceded it, the Commission ignored all of this evidence, contending that arguments concerning these benefits are indistinguishable from arguments that the ownership limits should be relaxed.<sup>18</sup> Nexstar has shown that the Commission’s approach violates at least four statutory commands,<sup>19</sup> and Chairman Pai similarly recognized that the FCC’s “evasion” ignores the fact that attributing

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<sup>14</sup> Nexstar Petition at 15-24.

<sup>15</sup> See ACA Opp. at 19-25; *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371 (2014) (“*2014 Order*”).

<sup>16</sup> ACA Opp. at 22, 24.

<sup>17</sup> See, e.g., Nexstar Petition at 16-17 and sources cited in nn. 48-51.

<sup>18</sup> *Order*, 31 FCC Rcd. at 9890 n.176; *2014 Order*, 29 FCC Rcd. at 4534.

<sup>19</sup> Nexstar Petition at 16-19.

JSAs amounts to a tightening of the local television ownership rule, requiring consideration of JSAs' public interest benefits.<sup>20</sup> This, together with the numerous other errors Nexstar identified, is a "material error" and a "material omission" that requires reconsideration.

UCC mounts a much briefer defense of the JSA attribution rule, contending that the public interest benefits that Nexstar has shown to flow from its JSAs are "actually public interest detriments" because they "result in the airing of identical programming in the same market, decreasing the diversity of programming."<sup>21</sup> There are multiple problems with UCC's claim. First, it is factually overstated and mainly wrong. Indeed, in each of the markets where UCC alleges "identical programming," it entirely ignores other non-duplicative programming produced in that market.<sup>22</sup> Second, and more importantly, UCC would presumably favor *no* local news, sports or other local public service programming in a market to duplication of some de minimis amount. Throughout these proceedings, Nexstar (and numerous others) have provided example after example of JSAs that have enabled stations that otherwise could not afford to produce local news and public service programming to provide such programming to their communities.

In short, neither UCC nor ACA present anything in their Oppositions to justify preservation of the Order's decisions regarding local television ownership and JSA attribution.

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<sup>20</sup> See *Pai Dissent*, 31 FCC Rcd. at 10055.

<sup>21</sup> See UCC Opp. at 8-9.

<sup>22</sup> See *id.* at 9, n.33. UCC cites "examples" of simulcast or duplicate programming on stations in Little Rock-Pine Bluff, AR, Springfield, MO and Evansville, IN. But the same document cited by UCC notes (1) expanded high school football coverage on *one* station in Little Rock-Pine Bluff, (2) *one* Springfield, MO station's ability to broadcast its own live coverage of breaking news events, and (3) *one* Evansville station's live telecasts of high school football and basketball games. See Nexstar Ex Parte Filing, MB Docket Nos. 09-182 *et al.*, at 4, 6 (Aug. 6, 2014).

The Commission should thus reconsider that order, modify the local television ownership rule to allow duopolies in all markets, and eliminate the JSA attribution rule.

### **III. RETRANSMISSION CONSENT HAS NO PLACE IN THIS PROCEEDING.**

In an effort to distract from the Order's obvious deficiencies, ACA reprises arguments that it has repeatedly presented before regarding alleged harms to MVPDs and the retransmission consent marketplace that might result from duopoly ownership.<sup>23</sup> But retransmission consent has no place in the Quadrennial Review proceedings, as the media ownership rules under review are aimed at preserving competition, localism, and diversity for the public, not for the protection of MVPDs. Retransmission consent negotiations are governed by an entirely different set of rules, which require "good faith" and prohibit certain specific practices.<sup>24</sup> In fact, retransmission consent-related matters have been the subject of two separate proceedings unconnected to the media ownership rule reviews.<sup>25</sup> As a result, the Commission has consistently rejected MVPDs' invitations to insert retransmission consent considerations into its evaluations of the local television ownership rule.

Moreover, despite the efforts of ACA and others to convince the Commission to impose additional specific requirements on broadcasters, then-Chairman Wheeler determined that, based on a careful review of an extensive record compiled in the good faith negotiation standard

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<sup>23</sup> E.g., ACA Comments, MB Docket No. 09-182 (Mar. 5, 2012); ACA Comments, MB Docket No. 09-182 (July 12, 2010).

<sup>24</sup> 47 C.F.R. § 76.65(a)-(b); see 47 U.S.C. § 325(b)(3).

<sup>25</sup> *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718 (2011); *Amendment of the Commission's Rules Related to Retransmission Consent*, Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327 (2015).

proceeding, “it is clear that more rules in this area are not what we need at this point.”<sup>26</sup> To the extent ACA believes that further reform is appropriate, its remedies lie in the context of those separate proceedings or in a petition for rulemaking.<sup>27</sup> Regardless, ACA’s claims that the local television ownership rule is needed to protect MVPDs in retransmission consent negotiations have been thoroughly rebutted elsewhere.<sup>28</sup>

#### **IV. UCC’S ADDITIONAL ARGUMENTS PROVIDE NO BASIS FOR DENYING RECONSIDERATION.**

UCC argues that the Commission cannot modify the local television ownership rule without considering the impact of any change upon minority or female ownership, and that the television broadcast incentive auction justifies the denial of regulatory relief because it might affect minority and female ownership (which is essentially the same argument).<sup>29</sup> Neither argument provides a basis for denying reconsideration.

UCC’s chief substantive complaint appears to be the Commission’s re-adoption of the same revenue-based test for socially disadvantaged businesses that the Third Circuit struck down previously.<sup>30</sup> UCC’s remedy for that decision was to seek reconsideration of the Order (which it did not) or file an appeal (which some of its co-parties did) and present its argument to the courts. Further, although Nexstar supports efforts to promote increased ownership of broadcast

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<sup>26</sup> FCC Blog Post, An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules, <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (July 14, 2016).

<sup>27</sup> *Cf.* ACA Opp. at 4 n.10 (suggesting Petitioners should file a petition for rulemaking rather than seeking reconsideration of the Order).

<sup>28</sup> *E.g.*, Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216 (Dec. 1, 2015); Reply Comments of the National Association of Broadcasters, MB Docket No. 15-216 (Jan. 14, 2016).

<sup>29</sup> UCC Opp. at 2-4.

<sup>30</sup> *Id.* at 2-3.



outlets by minorities and women, the ownership rules simply have not been shown to achieve this goal.<sup>31</sup> In any event, to the extent the Commission believes that further analysis of the impact of relaxing the local ownership rule on ownership diversity is required, the agency can conduct such analysis as part of its reconsideration of the Order.

With respect to the spectrum incentive auction, neither UCC, nor the Commission before it, provides any real reason for delaying reconsideration of, or action on, the media ownership rules beyond speculation that the television industry is “on the precipice of great change,” the auction “may have a dramatic impact” and “it would be premature” to change the ownership rules.<sup>32</sup> Setting aside the rampant speculation inherent in those statements, as Commissioner O’Rielly noted, despite full knowledge of the Communications Act’s quadrennial review requirement, Congress declined to include an exemption or delay for that requirement when it enacted the auction legislation.<sup>33</sup> Further, the reverse auction portion of the incentive auction is over, the final stage rule has been satisfied, and the Commission is expected to inform stations of their new channel assignments within a few weeks. Thus, there is little more to be “evaluated” in terms of the auction’s impact. In addition, with only 84 MHz of broadcast spectrum to cleared, the incentive auction is not the sea change that some anticipated. Finally, to the extent that certain station owners elected to participate in the auction, demanding that archaic, outdated, harmful rules remain intact because these voluntary actions might “affect minority and female ownership” is absurd. Quite simply, the incentive auction does not provide a reason for delaying reconsideration of the Order.

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<sup>31</sup> See, e.g., Comments of the National Association of Broadcasters, MB Docket No. 14-50, at 89 (Aug. 14, 2014).

<sup>32</sup> Order, 31 FCC Rcd. at 9865; UCC Opp. at 3-4.

<sup>33</sup> Order, Dissenting Stmt. of Comm’r Michael P. O’Rielly, 31 FCC Rcd. at 10061.

## V. CONCLUSION

For the foregoing reasons and the reasons provided in the Petitions, the Commission should reconsider the Order insofar as it decided to retain the local television ownership rule virtually intact and modify it to permit duopolies in all markets; and should reconsider and reject the Order's determination that television JSAs should be considered attributable interests under the media ownership rules.

Respectfully submitted,

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February 3, 2017

### CERTIFICATE OF SERVICE

I, Jacqueline Martin, certify that on this 3rd day of February 2017, I caused a copy of the foregoing Nexstar Broadcasting, Inc.'s Reply to Oppositions to Petitions for Reconsideration to be served by first class mail, postage prepaid, upon the following:

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